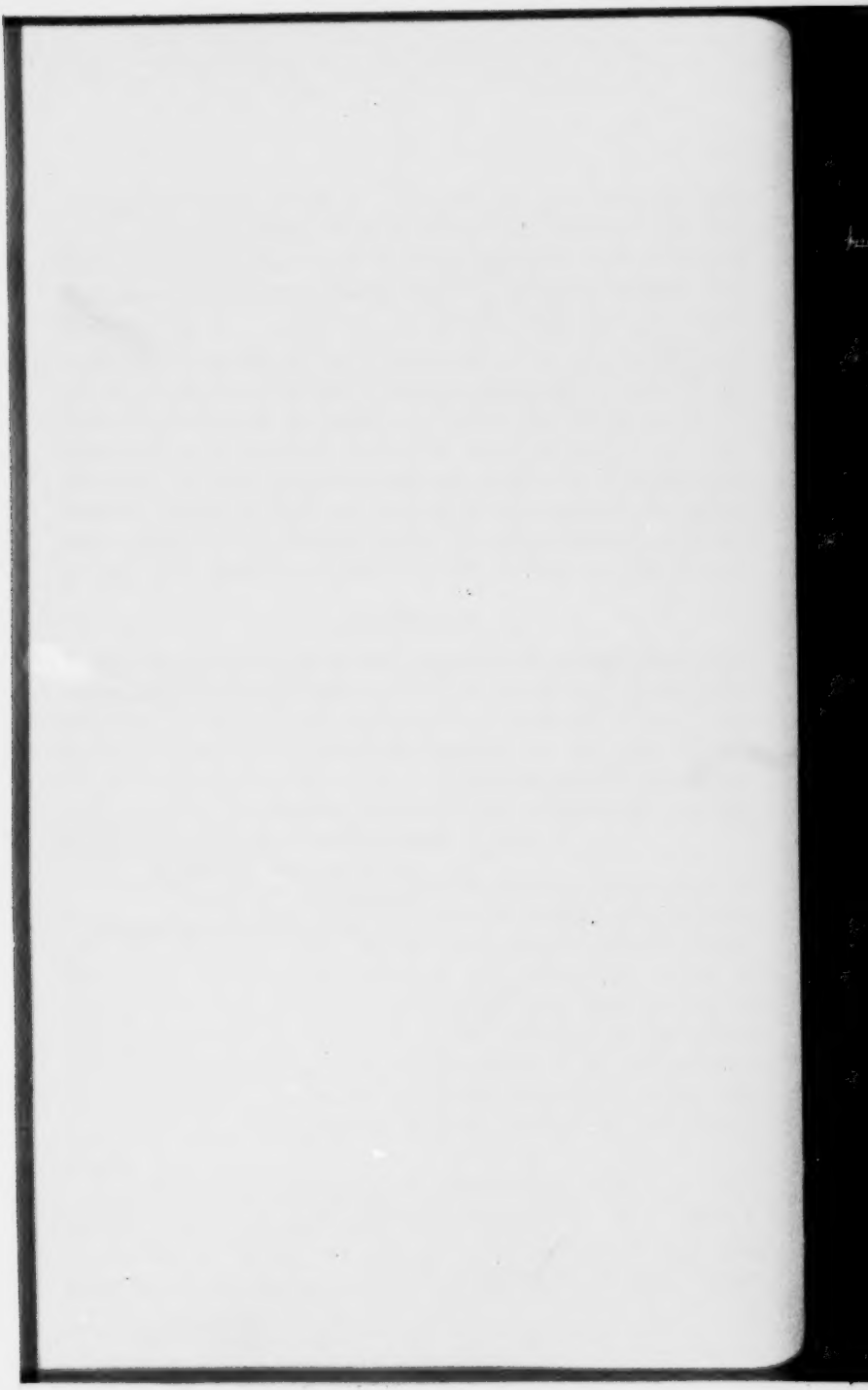

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DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF DELAWARE

Civil Action No. 1141

GREAT NORTHERN RAILWAY COMPANY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Defendant;

INTERSTATE COMMERCE COMMISSION, GENERAL MILLS, INC. AND MONTANA FLOUR MILLS COMPANY,
Intervening Defendants

STATEMENT OF BASIS ON WHICH PETITIONER CONTENDS THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW ON APPEAL THE JUDGMENT AND DECREE ENTERED HEREIN ON JANUARY 25, 1949.

Pursuant to Supreme Court Rule 12, paragraph 1, your petitioner files the following statement showing the basis upon which petitioner contends that the Supreme Court of the United States has appellate jurisdiction to review on appeal the judgment and decree from which petitioner has prayed for an order allowing an appeal herein:

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1. The statute believed to sustain appellate jurisdiction is Section 1253 of Title 28 of the United States Code which provides that, with exceptions not here material, any party may appeal to the Supreme Court of the United States from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any act of Congress to be heard and determined by a district court of three judges.

The within action was brought to set aside, annul and perpetually enjoin an order of the Interstate Commerce Commission under former Sections 41 Subd. 28, 43, 44, 45a, 46 and 47 of Title 28, United States Code, as those sections provided prior to the revision of said Title effective September 1, 1948. Said former Section 47 provided that an action to set aside, annul or enjoin an order of the Interstate Commerce Commission should be heard and determined by a district court of three judges and was a part of the Urgent Deficiencies Act of October 22, 1913. Its provisions insofar as they require such actions to be heard and determined by a district court of three judges are now contained in the Revised Judicial Code under Sections 2284 and 2325 of Title 28, United States Code. This action was heard and determined, after notice, by a district court of three judges and the appeal sought is from the final judgment and decree denying a permanent injunction.

2. The judgment and decree from which the petitioner has asked the permission of this Court to appeal was dated and filed on January 25, 1949, and the application for an appeal is presented to the Court simultaneously with this statement on January 31, 1949.

3. The nature of the case which has resulted in the judgment and decree aforesaid is apparent from the following résumé:

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By a report and order of the Interstate Commerce Commission, dated December 18, 1947, as subsequently corrected *nunc pro tunc,* reconsideration of which was denied, petitioner was directed to establish on or before March 29, 1948, on not less than 30 days' notice, and thereafter to maintain and apply to the transportation, in carloads, of wheat and wheat products from points on its line from the so-called triangle territory in central Montana to points in California and Nevada via routes *through Butte, Montana,* when milled or stored in transit at Great Falls, Montana, rates which should not exceed contemporaneous joint rates from and to the same points over the same routes on shipments of similar commodities *not* stopped in transit. The effective date of the order was thereafter from time to time postponed by the Commission, the last few orders of postponement having been entered after the within action was brought for the purpose of preserving the *status quo* pending determination of said action. The order is now to become effective February 15, 1949, on not less than 5 days' notice.

The within action was commenced by a petition filed herein on July 26, 1948, in which it was prayed that this Court, upon grounds set forth in said petition, enter a judgment and decree setting aside and perpetually enjoining the enforcement of said order. The final judgment and decree herein on January 25, 1949, has dismissed that petition and denied the relief therein sought.

4. Appended hereto and marked Exhibit "A" is a copy of the opinion delivered by the District Court upon the rendering of the judgment and decree from which an appeal is applied for.

5. The grounds upon which it is contended that the questions involved are substantial are as follows:

(a) Said report and order of the Commission require the defendant to establish a transit privilege permitting separate intrastate shipments of wheat over petitioner's railroad from Montana origins to Great Falls, Montana, which have been unloaded and delivered to be united with subsequent interstate shipments of wheat or wheat products from Great Falls over railroad routes through Butte, Montana, to destinations in California and Nevada under an arrangement by which the initial and final shipments will be treated as continuous and at interstate rates applicable to a continuous interstate carriage.

(b) The effect of this arrangement will be to create new through routes (a route being "an arrangement • • • for continuous carriage") for shipments delivered for storing or milling at Great Falls.

> "A 'through route' is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another." *St. Louis, S. W. Ry. Co.* v. *U. S.*, 245 U. S. 136 (38 S. C. 49).
>
> "*There are many instances where the grant by tariffs of extensive transit or reconsignment privileges have rendered what otherwise would be independent local movements a part of the through interstate movement.*" *B. & O. S. W. Rr. Co. v. Settle*, 260 U. S. 166, 173-174 (43 S. C. 28). (Emphasis supplied.)
>
> See *Texas Steel Company v. Missouri-Kansas-Texas Rr. Co.*, 225 I. C. C. 337, 339; *Scoular-Bishop Grain Co. v. M. & St. L. Rr. Co.*, 200 I. C. C. 663; *Wray-Goodwin, Inc. v. Southern Ry. Co.*, 268 I. C. C. 765; *Arkadelphia Milling Co. v. St. Louis, S. W. Ry. Co.*, 249 U. S. 134 (39 S. C. 237).

(c) Neither the complaint before the Commission, the hearing, or the findings of the Commission were directed at the issue of through routes and the Commission made no

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finding under Section 15(3) of the Interstate Commerce Act that through routes were necessary or desirable in the public interest. The order was therefore void. *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 666; *Missouri Millers Assn.* v. *Alton R. Co.*, 241 I. C. C. 337, 340.

(d) Routes via Butte short-haul petitioner in respect of the traffic described and petitioner objects to their creation. The Commission may order the establishment of routes short hauling a railroad without its consent only in compliance with Section 15(4) of the Interstate Commerce Act and upon specific findings under that Section. *Pennsylvania RR Co.* v. *U. S.*, 323 U. S. 588, 590.[1] No such findings were made in this case and the order of the Commission is therefore void. *Idem.*

(e) The order is void because by it the Commission has attempted to assume jurisdiction over rates and commerce presently intrastate without complying with the statutory prerequisites for the assertion of such jurisdiction. *Arkadelphia Milling Co.* v. *St. L., S. W. Ry. Co.*, 249 U. S. 134 (39 S. C. 237); *Scoular-Bishop Grain Co.* v. *M. & St. L. RR Co., supra; Wray-Goodwin, Inc.* v. *Southern R. Co., supra.*

(f) Even if the case before the Commission were pleaded and litigated under Sections 15(3) and 15(4) of the Interstate Commerce Act and even if findings had been made thereunder (which is not the case), the evidence does not support findings under Sections 15(3) and 15(4) and the order is therefore void.

(g) The question whether Sections 15(3) and 15(4) of the Interstate Commerce Act, may be wholly disregarded by the Commission in ordering the establishment of a transit privilege which will permit separate intrastate ship-

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[1] There it was said: "The Commission's authority to grant relief is bottomed on Sections 15(3) and 15(4)."

ments, unloaded and delivered, to be united to interstate shipments of a different commodity, or of unidentified tonnages of the same commodity, subsequently made, to form a fictionally continuous carriage over a through route not otherwise available for shipments so separated is substantial indeed.

The Commission and the Court below say that the Commission did no more in the report and order attached here than was "contemplated" under a decision in a previous general grain rate investigation, 205 I. C. C. 301. It is enough to say in that connection that despite implications to the contrary in the Court's opinion herein universal transit was not required by that decision (See *Burris Feed Mills* v. *A. T. & S. F. Ry. Co.*, 231 I. C. C. 153, 160) and was not established thereunder in a substantial number of instances. (Commission's Transcript, pp. 167, 260, 288-9, 291.)

Sections 15(3) and 15(4) become nugatory by a construction of the Act that through routes may nevertheless exist in fact in cases where the carriers do not allow the billing of separated shipments as fictionally continuous and where, therefore, tariffs make it impossible to apply the through rates applicable to continuous movements. (See Commission's Transcript, p. 120.) If through routes do exist in such cases, in what instances do they *not* exist and in what cases, if any, are Sections 15(3) and 15(4) now intended to have effect?

Railroads like petitioner which serve the great producing areas of the West and depend primarily for revenue on originating, rather than terminating, traffic are put to the expense of supplying the cars and building and maintaining the branch lines which permit the loading and movement of raw materials to consuming markets—an expense which intermediate and terminating carriers are not subjected to. Sections 15(3) and 15(4) were designed to protect the long

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hauls of originating carriers in all cases where it was not shown that there was present a countervailing public necessity or desirability requiring short hauling. Such countervailing public necessity or desirability, under these sections, must be found by the Commission, after a hearing directed to that issue, before an order requiring the establishment of new through routes can be valid, and the findings must show the order to be within the limitations on short hauling in Section 15(4) as well as the existence of a public necessity or desirability as required by Section 15(3). *U. S.* v. *Mo. Pac. Rr. Co.*, 278 U. S. 269. All the railroads of the country —particularly originating carriers—are vitally interested in the question of whether a transit privilege which will create new routes for shipments delivered for storing or processing at points on their lines, new routes which may short haul a railroad on important traffic, can now be ordered in complete disregard of these sections. Because the Commission and the District Court have answered the question squarely in the affirmative in a case of initial impression on that direct point, and petitioner believes a negative answer is essential to afford these sections any force whatever, the question appears indeed substantial.

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Dated January 31, 1949.

EXHIBIT "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

Civil Action No. 1141

GREAT NORTHERN RAILWAY COMPANY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Defendant*

INTERSTATE COMMERCE COMMISSION, GENERAL MILLS, INC., and MONTANA FLOUR MILLS COMPANY, *Intervening Defendants.*

Edwin C. Matthias, Reuben J. Hagman, and Louis E. Torinus, Jr. of St. Paul, Minn.; Clarence A. Southerland, David F. Anderson, William Poole and Southerland, Berl & Potter of Wilmington, Del. for petitioner.

Edward Dumbauld and William J. Hickey, Special Assistants to the Attorney General, and Herbert A. Bergson, Assistant Attorney General, all of Washington, D. C., and William Marvel, United States Attorney, of Wilmington, Del. for defendant.

J. Stanley Payne, Assistant Chief Counsel, Interstate Commerce Commission and Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, of Washington, D. C. for intervening defendant Interstate Commerce Commission.

S. J. Wettrick and Floyd F. Shields of Chicago, Ill. and Robert H. Richards, Jr. (of Richards, Layton & Finger) of Wilmington, Del. for intervening defendants General Mills, Inc. and Montana Flour Mills Company.

Before Biggs, Circuit Judge, Leahy, Chief Judge, and Rodney, District Judge

RODNEY, *District Judge:*

This is an action to restrain the enforcement of an order made by the Interstate Commerce Commission. The case

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was based upon the following facts: In March, 1946 General Mills, Inc., a corporation of the State of Delaware, instituted certain proceedings before the Interstate Commerce Commission against Great Northern Railway Company, a corporation of the State of Minnesota. Montana Flour Mills Company intervened in such proceedings in support of the complainant. The foregoing proceedings culminated in an order of the Commission dated December 18, 1947.[2] The order, as originally made, concerned rates for the transportation of grain or grain products from points in Central Montana to points, inter alia, in California. The order required that such rates should apply to grain or grain products routed through Butte, Montana when milled or stored in transit at Great Falls, Montana and required that such rates should not exceed existing joint rates from and to the same points over the same route on shipments of similar commodities not stopped in transit. The order of the Commission was revised and amended on July 7, 1948 to apply to "wheat and wheat products" instead of "grain and grain products" and was restricted to transportation from points "in the triangle territory in central Montana" rather than "from points in central Montana."

The present action is brought by Great Northern Railway Company against the United States of America seeking to annul and set aside the order of the Interstate Commerce Commission. The Interstate Commerce Commission, General Mills, Inc., and Montana Flour Mills Company have intervened as parties defendant.

The facts surrounding this case are elaborately set out in the opinion of the Commission (269 I. C. C. 457). Only such facts as may be necessary to a general understanding of the present question are here repeated and as succinctly as possible.

There is a territory in central Montana known as the Montana triangle which is serviced by the lines of the plaintiff company. This area is embraced within a rough or general inverted triangle with the apex at Great Falls, Montana and the base being a line from Havre on the East

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[2] 269 I.C.C. 457.

and Shelby on the West. Within this general area there is grown a superior kind of hard spring wheat specially desirable for certain purposes because of its high protein content. There is a large market for flour from this wheat in the California market, and mills at Great Falls, Ogden, Utah and other places are in keen competition for that market. There are two all-rail routes from the Montana triangle to California, one being a long route through Seattle and Portland and the other a shorter route through Butte, Pocatello and Ogden. Originally the all-rail rates on grain did not apply to the shorter route through Butte, but only on the route through Seattle and Portland. This arrangement was to enable the originating lines to procure the benefit of a long haul. These rates and routes were considered by the Commission in the elaborate and comprehensive investigation known as "Grain and Grain Products," 205 I. C. C. 301. It was there determined that the joint rates should apply to the route through Butte as well as that through Seattle and Portland (205 I. C. C. 301 at 449). This rate was 65 cents per hundred pounds, which amount was subsequently, in 1938, raised to 68 cents. It was also determined that two free transits or stop-overs should be allowed. It is around this term "transit," with its meaning and implications, that most of the present questions cluster.

A transit privilege, usually called a "transit", has been explained by the Supreme Court in Board of Trade *v.* United States, 314 U. S. 534, 537, as a privilege which "enables grain to be shipped from point A to point B, there to be stored, marketed or processed, and later shipped to point C at a rate less than the combination of the separate rates from A to B and B to C * * * The shipper pays the local rate on the inbound shipment to the transit point, B in our illustration. A receipted freight bill specifying the point of origin, the rate paid, and other pertinent data is recorded with the transit bureau as evidence of intention of further transportation of the inbound grain or its equivalent. When the outbound shipment is tendered to the carrier, the freight bill is surrendered in order that the shipper may obtain an outbound rate lower than that which he would otherwise

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be compelled to pay. The privilege belongs, as it were, to both the grain and its shipper."

General Mills, which instituted the proceedings before the Commission, has a large flour mill at Great Falls, Montana with a daily capacity of 2600 hundredweight of flour and, in connection with that mill, has a grain elevator with a storage capacity of 1,566,000 bushels of grain. It has also 15 other elevators in the triangle district with a combined storage capacity of 438,000 bushels.

After the same rate was established for grain moving from Montana to California by way of Butte as was applied to grain moving over the route through Spokane, Seattle or Portland, certain transit points were established at Odgen and other points on the Butte route. The Great Northern has maintained a transit point at Great Falls for wheat or wheat products moving to California by way of Seattle and Portland, but has not permitted transit at Great Falls for wheat or wheat products moving to California by way of Butte. Great Falls is intermediate from many points of the Montana triangle to Seattle and Portland and is intermediate from all points of the triangle to Butte. Great Falls is, however, not intermediate to Seattle for all points in the triangle and as to these points there is involved an out-of-line haul to Great Falls. This out-of-line haul required on shipments transited at Great Falls and routed through Portland and Seattle necessitates a charge of from 2 to 5 cents in addition to the fixed rate of 68 cents, while a shipment milled at Great Falls and reshipped to California via Butte without application of the present joint rates results in an additional charge up to 22 cents. It has been found by the Commission that a differential of 2 cents at the California market means the loss of competition.

It is in evidence that, due to climatic or other conditions, the hard spring wheat formerly obtainable in the southern segments of the Montana triangle is now only obtainable in more northerly portions where Great Falls is not intermediate on the route through Seattle and Portland. This, of course, must result in increasing out-of-line hauls where wheat is transited at Great Falls and routed through Seattle and Portland.

Great Northern opposed the establishment of a transit point at Great Falls for shipments by way of Butte because, as it contended, it would be deprived of the benefit of the longer haul by way of Seattle and Portland and have substituted therefor the comparatively short haul to Butte with the transit expenses applicable to either route. Great Northern contended the route through the Western Gateway via Seattle and Portland was not unreasonably long and, indeed, no such contention was made by any of the parties and the Commission made no finding on such basis.

The petitioner contends that the order of the Commission creates a new through route from the Montana triangle to California via Butte and would result in shorthauling the petitioner without its consent and that the order of the Commission was not based upon jurisdictional findings required by Sections 15(3) and 15(4) of the Interstate Commerce Act. The relevant portions of these sections appear in footnote.[3]

The basic issue between the parties appears at this point. The petitioner contends that the order of the Commission establishes a new through route from the Montana triangle to California through Butte where the transit occurs at Great Falls. The petitioner contends that this new through route can only be established upon compliance with the

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[3] 49 U.S.C., Section 15(3): "The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes * * *."

49 U.S.C., Sect. 15(4): "In establishing any such through route the Commission shall not * * * require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (2) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. * * *"

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provisions of Section 15(3) and, since this new through route would require the petitioner to forego an existing long haul, the new through route must comply with the provisions of Section 15(4). The United States, and the interveners, contend that the through route via Butte is already established and is unavailable to shippers only because of the failure of Great Northern to allow transit at Great Falls in the same manner as it permits in respect to transit points south of Butte.

The defendant, and interveners, contend that since through routes and joint rates are available for shipments from the triangle to California via Butte when transit is at points south of Butte, the requirement of the Commission that transit be allowed at Great Falls is merely an incidental action necessary to the operation of an existing through route and the general adjustment of rates on grain, and that this requirement of transit at Great Falls may be ordered by the Commission under Sections 1(5), 1(6) and 3(1).[4]

A "through route" is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to the destination on the line of another. In deter-

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[4] 49 U.S.C., Sec. 1(5): "All charges made for any service rendered • • • in the transportation of • • • property • • • shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

49 U.S.C., Sec. 1(6): It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe and enforce • • • just and reasonable regulations and practices affecting classifications, rates, or tariffs • • • and every unjust and unreasonable classification, regulation and practice is prohibited and declared to be unlawful."

49 U.S.C., Sec. 3(1): "It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever • • •."

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mining the existence of a through route, all of the circumstances connected with the shipments from place to place may be taken into account.[5]

The Commission has found that a through route existed from the Montana triangle to California via Butte for favored transitors south of Butte. It therefore ordered the establishment of transit privileges at Great Falls upon an existing through route and without the special findings required by Section 15(3). In this we think the Commission was correct. The order did not establish a new through route. It simply ordered the petitioner to discontinue what it termed an unreasonable practice and to make the through route and existing rates available to those entitled thereto. In Virginian Railway Company *v.* United States, 272 U. S. 658, 666, it was held that where through routes existed and combination rates were in effect, regulatory proceedings might be had under Sections 1 and 3 without the necessity of making the special findings under Section 15(3). The analogy and resemblance of the Virginian case and the case at bar is strong. In both cases the Commission found that through routes existed. In the Virginian case the Commission found the existing combination rates were unreasonable and discriminatory and prescribed reasonable and non-discriminatory rates. These actions were held proper under Sections 1 and 3 without the special findings required by Section 15(3). In the present case the existing rates were not found to be unreasonable or discriminatory. The Commission, however, found that where the facilities at Great Falls were utilized and shipments made by Butte, the failure of the carrier to establish transit privileges at Great Falls operated as a denial to the shipper of the use of such reasonable rates and resulted in the imposition of unreasonable and discriminatory rates. It has been said, "It is not the province of railroads to determine what markets shall be available to sellers or buyers, or by * * * the maintenance of rate disadvantages to restrict or circumscribe the opportunities of shippers located on other railroads to sell in markets served by them. It is their function to transport in the channels necessitated by

[5] *St. Louis S. W. Ry. Co.* v. *United States*, 245 U. S. 136, 139.

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trade conditions and not to fix limitations on commerce." D. A. Stickell & Sons, Inc. *v.* Alton Railroad Co., 255 I. C. C. 333, 337.

The petitioner contends that since, prior to the hearing, no transit existed at Great Falls connecting the inbound and outbound shipments at that point where the shipments were via Butte, there could be no continuous carriage there and, ergo, that there could be no through route at that point.

We think that a transit is an accompaniment or supplementary advantage in connection with an existing through route but does not, in itself, create the through route. The existence of a transit implies the existence of the through route. A transit at a particular point is the voluntary or required action of the particular carrier at such point, but a through route is not created by creating a transit.

Finally the petitioner contends that in the absence of transit at Great Falls the inbound shipment from the Montana triangle to Great Falls is intrastate and the shipment from Great Falls to California via Butte is interstate and that the Commission did not follow the procedure necessary to obtain jurisdiction in such situation. The establishment, however, of an interstate rate from the Montana triangle to California via Butte (205 I.C.C. 301) contemplated the existence of transit points where such points should be required and such fact has been expressly found in this case. The carrier, alone, by its action in establishing a transit point cannot solely determine the application of existing intrastate and interstate rates. A transit has been determined to be an essential part and universal practice in connection with the transportation of grain. Ordinarily, it seems that the establishment of transit privileges at particular points is left to the discretion of the carrier. When a carrier denies transit at an intermediate point along a through route and such denial operates in a manner that is unreasonable and unduly prejudicial, then we think the Commission, by Sections 1 and 3, and Section 15(1), has power to correct the discrimination and order the establishment of the transit. In Central Railroad Co. of New Jersey v. United States, 257 U.S. 247, it is said, "The Commission clearly has power under Sec. 1 * * * to determine whether

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in a particular case a transit privilege should be granted or should be withdrawn." See also Thomas Keery Co. v. N.Y.O. & W. Ry. Co., 206 I.C.C. 585; 211 I.C.C. 451; 226 I.C.C. 335.

As we view it these are the ultimate facts. For a shipment from the Montana triangle to California via the Western Gateway of Seattle and Portland and with transit privileges at Great Falls there exists a through route at a joint rate of 68 cents, subject to an out-of-line haul to Great Falls as to those points where Great Falls is not intermediate. For a shipment from the triangle to California via Butte this same joint rate of 68 cents applies where transit is had at points south of Butte. For a shipment from the triangle to California via Butte where grain is processed at Great Falls and without transit privileges there, the combination rates are as high as 90 cents. The order of the Commission gives to the processors at Great Falls the advantage of the same rates enjoyed by other transit points on the same through route south of Butte.

Findings of fact and conclusions of law are filed with this discussion. A judgment will be entered dismissing the petition in this case and an order therefor may be submitted.

Dated: December 27, 1948.

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IN THE

Supreme Court of the United States

October Term, 1948

Docket No. 621

GREAT NORTHERN RAILWAY COMPANY, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GENERAL MILLS, INC. AND MONTANA FLOUR MILLS COMPANY,
Appellees.

REPLY TO MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

October Term, 1948

Docket No. 621

GREAT NORTHERN RAILWAY COMPANY, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GENERAL MILLS, INC. AND MONTANA FLOUR MILLS COMPANY,
Appellees.

REPLY TO MOTION TO AFFIRM

Appellant, pursuant to Rule 12, paragraph 3, and Rule 7, paragraph 3, of the Revised Rules of the Supreme Court of the United States, submits this reply to the motion of appellees United States of America and Interstate Commerce Commission[1], served February 16, 1949, that the judgment of the District Court be affirmed.

[1]The motion is signed by counsel for the United States and the Interstate Commerce Commission only and not by counsel for the remaining appellees.

STATEMENT

As appellees indicate, this appeal is from a final judgment dismissing a complaint seeking to set aside an order of the Interstate Commerce Commission requiring appellant to establish a certain transit privilege[2] at Great Falls, Montana.[3]

The transit ordered would permit carloads of wheat delivered to appellant at stations in the "Montana Triangle" (shown on Appendix 1), shipped to Great Falls, Montana, on an intrastate bill of lading, there delivered, unloaded and stored in elevators or milled into flour or other products, to be connected with subsequent shipments from Great Falls, of wheat or products, to destinations in California and Nevada *via routes through Butte, Montana,* under an arrangement whereby, fictionally, the two separated shipments, into and out of Great Falls, would be treated as one continuous movement and at rates applicable to continuous through shipments. Routes through Butte short haul[4] the appellant on such shipments, for it already participates in numerous other routes from Triangle stations to California and Ne-

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[2] In *Texas Steel Company vs. Missouri-Kansas-Texas RR. Co.*, 225 I. C. C. 337, 339, the Commission defined transit as

"the stopping of a commodity for processing or other purposes, and the forwarding of the same, or an equivalent, *under an arrangement which by legal fiction, ties the inbound and outbound movements together so as to create what, before the law, is a continuous through movement and not two separate movements.*" (Emphasis supplied.)

Other explanations appear in footnote 3 of appellees' motion.

[3] In addition to the terms of the order quoted in footnote 2 of appellees' motion, the order incorporated by reference the Commission's accompanying report at 269 I. C. C. 457, which concluded as follows:

"An order requiring the establishment of transit arrangements found reasonable will be entered."

[4] I. e., require appellant to turn this traffic over to a connecting line without having received its maximum haul between origin and destination. See *Pennsylvania RR. Co. v. U. S.*, 323 U. S. 588.

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vada[5] through Great Falls for the transportation of wheat and wheat products which allow it a greater portion of the total haul. The latter routes extend through any one of several junctions between appellant's railroad and connecting railroads in Washington, Oregon, and northern California (Appendix 1). Appellant has established transit at Great Falls available in connection with Triangle shipments routed via these western junctions to California but since the transit privilege itself does not extend to shipments routed via Butte any shipments of wheat or flour from Great Falls via Butte, if made, would be not only physically separate from any prior rail carriage into Great Falls but would also be contractually distinct (Commission's Tr. p. 120).[6]

The presently applicable rates for the movement from the Triangle into Great Falls on wheat which is there delivered and which does not move out under an existing transit privilege are intrastate, for the haul is entirely within Montana. These intrastate rates differ in amount from the local interstate rates from Triangle origins to Great Falls which are used in constructing "combination rates" for through interstate movements to out of state destinations (Commis-

[5]For convenience the destination territory is hereafter referred to as California, since that is the area principally involved.

[6]Parenthetical references are to pages in the transcript of testimony taken by the Commission and to exhibits received by the Commission, all of which were incorporated in Petitioner's Exhibit 1, received by the District Court.

sion's Tr. pp. 115, 120, 125, 126; Commission's Exhibit 1, p. 19).[7]

There is a joint interstate rate of 68 cents per cwt.[8] applicable on wheat and wheat products shipped from a large area in Montana (which includes not only Great Falls and the entire Triangle but many more grain shipping stations) to California either via the western junctions of the appellant (Portland, Oregon, for example) or via Butte. This rate was directed by the Commission on shipments via Butte in *Grain and Grain Products,* 205 I.C.C. 301, at the request of "mills at Ogden and in southern Idaho" who wished to draw Montana wheat "for blending purposes," (see p. 449 of that decision) though the Montana millers (including both millers involved in the present controversy) then opposed opening the Butte routes for shipments of grain from Montana. (Commission's Ex. 5; Commission's Tr. p. 259). The Commission in that proceeding did not, however, order transit to be granted in connection with any specific movements, or at particular locations, but on the contrary expressly stated that it would not disturb "the carriers' present exercise of judgment as to the necessity for transit in specific instances,"

[7]Rates restricted to intrastate transportation may not be used to make up a combination rate applicable on a through interstate movement (*Ryan Co. vs. Chicago, St. P. M. & O. Co.*, 174 I. C. C. 665) and where there are two local rates, one for interstate application and one for intrastate application, only the former may be used to construct interstate combination rates. *Coffeyville Vitrified Brick & Tile Company v. St. Louis & San Francisco RR. Co., et al,* 25 I. C. C. 101, 102. In *Cotton from Texas to Texas Ports,* 191 I. C. C. 388, the Commission said:

"It is common practice for interstate rates to be published for application between two points in a single State, where the transportation between such points is wholly within the boundaries of that state, but by various means such, for instance, as transit arrangements, the transportation which to all appearances, is intrastate, is linked with transportation from or to points in other States, or foreign countries, in such manner as to render the through movement, including that between the two points in one State, subject to our jurisdiction."

[8]The rate was increased after the evidence in the record was prepared. For convenience, it is here described as the 68 cent rate.

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which, it said, "will continue to be governed by the facts presented to the carriers."[9] Appellant and other Montana lines thereafter continued their long standing practice of granting transit at intermediate Montana milling points where shipments from the milling point were routed through western junctions but felt no requirement to establish transit so as to permit shipments from said milling points to be routed via Butte as transit tonnage, which would short haul them, and did not do so.[10]

There are out-of-line hauls to Great Falls which occur in connection with routes from *a portion* of the Triangle to California through western junctions and where such hauls occur out-of-line charges have been assessed in addition to the 68 cent rate. Such out-of-line charges would not be applicable were the Butte routes opened for Triangle shipments stored or milled at Great Falls. On facts not material to this motion appellant contended before the Commission, among other things, that the millers and merchandisers at Great Falls had certain advantages by reason of the liberal terms of the transit presently accorded them which prevented these out-of-line charges from working an actual prejudice.

[9]See the Commission's report in the instant case, *General Mills, v. Great Northern Ry. Co.*, 269 I. C. C. 457, at pp. 468-9; *Burrus Feed Mills vs. A. T. & S. F. Ry. Co.*, 231 I. C. C. 153, 160. "A *maximum* of two free stops in transit" was permitted and "transits to the number of two *when granted*" were required to be "without separate charge". (Emphasis ours, idem.)

[10]In the past the Commission had approved transit limitations to maximum haul routes in similar situations involving joint rates on grain (*Dean Mill Company v. Missouri Pacific R. Co.*, 80 I. C. C. 174, 177; *Globe Grain & Milling Co. v. A. T. & S. F. Ry. Co.*, 142 I. C. C. 391, 392; *Smith & Scott v. A. T. & S. F. Ry. Co.*, 185 I. C. C. 381, 385) as well as other commodities (*Transit Restrictions on Wine to Eastern Territory*, 222 I. C. C. 45). The Northern Pacific and Milwaukee Railroads followed the same course as appellant and still limit transit on Montana grain destined to California to their long haul routes. (Com. Ex. 9; Com. Tr. pp. 281-287). The Southern Pacific, a California connection of appellant, has likewise restricted transit for a similar reason in certain instances (Com. Tr. p. 167).

The Commission found, however, that appellant's failure to establish transit at Great Falls in connection with shipments which might move through Butte was unreasonable and unduly prejudicial and it is on that ultimate finding that its order rests.

Appellant contends that the Commission's order is invalid for four reasons: (1) as creating through routes[11] via Butte for wheat stored or milled at Great Falls though the issue of new through routes was neither pleaded nor litigated under Section 15 (3)[12] of the Interstate Commerce Act and though no findings under that section were made,[13] (2) as creating routes short hauling appellant without its consent without findings under Section 15(4),[14] and in complete disregard thereof, (3) as an assumption by the Commission of

[11]The Interstate Commerce Act contains no definition of a through route. A definition taken from an early Commission decision is found in a footnote in *St. Louis S. W. Ry. Co. vs. U. S.*, 245 U. S. 136, as follows:

"A 'through route' is an arrangement, express or implied, between connecting railroads *for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another.*" (Emphasis supplied.)

[12]*49 U.S.C., Sec. 15(3)* reading as follows:

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes * * *."

[13]In *Virginian Ry. Co. v. U. S.*, 272 U. S. 658, 666, it was stated that the absence of a finding of public necessity or desirability under Section 15(3) voids an order creating through routes.

[14]*49 U.S.C., Sec. 15(4)* reading as follows:

"In establishing any such through route the Commission shall not * * * require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. * * *"

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jurisdiction over intrastate commerce without complying with statutory prerequisites for such assumption, and (4) because even if this case had been pleaded and litigated and findings had been made under Sections 15(3) and 15(4) (which is not the case), the evidence would not support such findings or any order creating through routes for such traffic short hauling appellant.

ARGUMENT

I.

Appellees' Motion Assumes the Validity of Commission's Declarations Which are Contrary to the Record and are Challenged by this Appeal.

The gist of the argument for affirmance is this: that through routes via Butte are now open at joint rates on shipments of wheat and wheat products from the "Montana Triangle" moving to California not stored or milled at Great Falls; that millers and merchandisers of wheat at that point are "precluded from use of these routes because of high combination rates resulting from the denial of transit" at Great Falls; that "the most cursory consideration of the terms of the Commission's order" indicates that it "does not direct appellant to establish a new through route" but merely a transit privilege "in connection with 'the present joint rates from and to the same points over the same routes' which appellant now maintains via Butte" on shipments not stopped in transit; and that such a transit privilege is merely a reasonable rule or regulation incidental to the lawful operation of an existing route which the Commission, acting under

powers granted by Section 15(1) to correct unreasonable and prejudicial rates and practices, has ample authority to require without making findings under Sections 15(3) and 15(4).

In effect, this is a restatement of the Commission's justification, stated in its report, for the order that it made, a justification which appellant contends was erroneously accepted by the District Court. Except as to appellee's comment as to what is revealed by "the most cursory consideration of" the literal "terms of the * * * order" (which is dealt with later herein), that justification and appellee's whole argument both rest—and in substance are stated by appellees to rest—upon two basic preliminary declarations of the Commission, either one of which must be valid to give that justification and appellees' argument effect. The first declaration is that the Butte routes are now open at "high combination" rates for the traffic here involved (that is, for shipments originating in the Triangle, delivered at Great Falls, there stored or milled, and thence shipped to California); the second is that the transit ordered is merely a regulation "incidental" to the lawful operation of the existing routes now open on shipments of wheat or wheat products moving straight through.

This suit, however, is not merely a test to determine whether the Commission's declarations, stated in the report, support its own ultimate findings and order. And appellant here does not ask the Court to determine the validity of the order, the substance of which is apparent only by considering its terms in connection with the facts on which it must operate, merely "by the most cursory consideration."

On the contrary appellant directly challenges both of the declarations of the Commission on which it justifies its order

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and on which appellees rely and directly challenges also the validity of the order. This challenge rests primarily not on declarations or "findings" contained in the Commission's report nor on the literal terms of the order, *but on incontrovertible facts conclusive in the record but not readily apparent from the report and order.* And in support of its case, of course, appellant has brought to this Court not merely the Commission's report but the entire record.

A declaration by the Commission either that a through route exists for certain traffic or that the effect of its order is simply the prescription of a regulation or practice "incidental" to the operation of an existing route involves the determination of mixed questions of law and fact.[15] Many years ago this Court said, upon sustaining a lower court in setting aside a Commission finding concerning the existence of a satisfactory through route and an order based thereon:

> "* * * the existence of such route may be inquired into by the courts, *notwithstanding a finding by the Commission.* * * * In the present instance there is no room for difference as to the facts, and the majority of the Commission plainly could not or would not have made the type of declaration in their order [as to the existence of such a route] * * * *but for a view of the law upon which this court must pass.*"
>
> (Holmes, J., in *Interstate Commerce Commission v. Nor. Pac. Ry.*, 216 U. S. 538, emphasis supplied.)

So here, under indisputable facts clear from the record itself but not from the Commission's report, appellant contends that the Commission could not have made either of the basic declarations upon which appellees' motion is based "but for a view of the law" which appellants here challenge and upon which, in this appeal, we ask the Court to pass.

[15]Many such questions arise under the Act. See for example *U. S. v. Idaho*, 298 U. S. 105.

II.

There are No Through Interstate Routes Via Butte From the Montana Triangle to California Open at "Combination Rates" (As That Term is Properly Used in Virginian Ry. Co. vs. U. S., 272 U. S. 658, 668) For Shipments Stored or Milled at Great Falls.

The statement in the caption is based upon the following indisputable facts:

(a) Wheat shipped to Great Falls from the Triangle and other Montana origins after delivery at Great Falls to the consignee is either stored there in elevators and "loses its identity," or is milled into unidentifiable flour or wheat products (Com. Tr. p. 69). Some of it (about 10 per cent) is then distributed at Great Falls or within Montana (Com. Tr. pp. 31-33, 220, 340-341), a large part of it goes to Duluth, Minneapolis, the North Pacific Coast, or other points, and a much smaller part finally goes to California (Com. Tr. pp. 22, 71, 152; Com. Ex. I, pp. 48 to 50).

(b) Any outbound shipment of wheat or wheat products from Great Falls to California *via Butte* must presently be made on a new bill of lading containing no reference to the inbound movement; that is, under an entirely separate contract of carriage, "for the reason," frankly stated at the Commission's hearing without contradiction *by a witness for the complaining miller,* "that no transit is permitted at Great Falls [in connection with the Butte routes]; therefore the reshipment from that transit point is a local shipment and no inbound transit billing is applied on the outbound movement" (Com. Tr. p. 120).[16]

[16]See footnote 2, *supra.*

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(c) "The *intrastate* rates from origin to Great Falls" now apply to a shipment of wheat or products from the Triangle to Great Falls even though subsequently a separate interstate outbound shipment of the same commodity or products thereof may be made from Great Falls to California. On this the complaining miller (Com. Tr. p. 120) and appellant's witness (Com. Tr. pp. 310-311) both agree. This fact was inferentially determined also by the Commission,[17] for in its report it adopts the complaining miller's computation of the total charge from Chester, Montana, (a Triangle origin) to Los Angeles, California, on two shipments of wheat, the first being delivered at Great Falls for storage or milling and the second being shipped out from Great Falls to Los Angeles, as being 90c per cwt., (see 269 I.C.C. at p. 460), or the aggregate of the 22c intrastate rate from Chester to Great Falls (Com. Ex. 1, p. 19) and the 68c interstate rate from Great Falls to Los Angeles rather than as being an "interstate combination rate" of 91 cents, which would be produced if it were proper to add the 23 cent interstate local rate from Chester to Great Falls (Com. Ex. 1, p. 19) to the outbound 68¢ interstate charge.[18]

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[17]The Commission could hardly have determined otherwise in view of *Arkadelphia Milling Co. v. St. Louis S. W. Ry. Co.*, 249 U. S. 134, holding that even though 95% of the products of certain rough materials processed at a particular milling point in the state of their origin actually moved outside the state "so that this entered into the purpose of the parties when shipping the rough material to the mill," this circumstance "did not alter the character" of the initial movement, which was at an end at the mill and therefore remained intrastate so that a state and not an interstate tariff applied and in view of its own decisions in *Scoular-Bishop Grain Co. v. M. & St. L. R. Co.*, 200 I. C. C. 663, and *Wray Goodwin, Inc. v. Southern Ry. Co.*, 268 I. C. C. 765. In the latter case it said:

> "There being no definite intention at the time of original shipment to forward these particular shipments to interstate destinations, and there being no transit arrangement in effect, the inbound movements * * * were intrastate and not within the jurisdiction of this Commission."

[18]See footnote 7, *supra*.

(d) There was no testimony that even as much as a single car of wheat or wheat flour had ever been shipped from Great Falls to California via Butte.

The circumstance that the shipments are far from continuous in physical fact,[19] coupled with the fact that there is no actual flow of Triangle wheat shipped from Great Falls via Butte, and that there can be no intent at Triangle origin to ship beyond Great Falls to any particular interstate destination tonnage which "loses its identity" at Great Falls and may there be disposed of distinguish the situation here from *U. S. vs. Capital Transit,* 325 U. S. 357, and earlier leading cases like *Texas and New Orleans R. R. Co. vs. Sabine Tram Company,* 227 U.S. 111; *Baltimore & Ohio Southwestern R. R. Co. vs. Settle,* 260 U.S. 166; and *Carson Petroleum Co. vs. Vial,* 279 U.S. 95, where, one or more of these circumstances being present, it could be said that certain movements, considered together, were interstate in their entirety. The complete break in physical continuity with no contractual arrangement for bridging the gap, even fictionally, would also seem to be conclusive that no through routes via Butte presently exist under the definition of that term quoted in *St. Louis South Western Ry. Co. vs. United States, supra,*[20]

The intervening custody of the consignee at Great Falls and the necessity for new billing combine to leave this situation outside the concept of a through route under the definition in Locklin's "Economics of Transportation"[21] (1947), where it is said at page 869:

[19]The interval between the shipments to and from Great Falls under the transit privilege sought in this case could be as long as two years (Com. Tr. p. 305).

[20]See footnote 11, *supra.*

[21]Cited in *Board of Trade of Kansas City v. United States,* 314 U. S. 534, 538.

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> "By a 'through route' we mean an arrangement between connecting carriers for the continuous carriage of goods *on a single billing* from a point on the lines of one carrier to a point on another." (Emphasis supplied.)

And loss of the carrier's custody at Great Falls and the consequent necessity for a new bill of lading at that point make it impossible at the point of original shipment to comply with Section 15(8)[22] of the Interstate Commerce Act making it mandatory for carriers by railroad to issue a "through bill of lading" whenever a shipment is tendered for transportation over an established "through route."

In an early and controlling Commission decision on through routes and through rates cited with approval many times in leading decisions of the Supreme Court,[23] *Through Routes and Through Rates,* 12 I. C. C. 164, it is said with respect to a through route:

> *"The route being one, a charge for a service over it is a charge for a single service, all the terms of which must be fixed at one and the same time; that is, at the time the initial carrier enters into the engagement for the service.* The rate is either a joint through rate made by arrangement by the parties to the through route, or it is a combination through rate consisting of 'the separately established rates, fares, and charges applied to the through transportation.' *This sum, however, is a single rate for a single service, and a contract for through transportation is a contract for transportation at the through rate, whether jointly or separately established, in force at the time the shipment is billed."* (Emphasis ours.)

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[22] 49 U.S.C., Sec. 15(8).

[23] For example, *St. Louis S. W. Ry. Co. v. U. S., supra, and Virginian Ry. Co. v. U. S. supra.*

If a through route implies "a charge for a single service" which is "either a joint through rate" or "a combination through rate," the indisputable fact, present here, that a separate intrastate rate is applicable for the first separate movement is itself evidence that a through interstate route (or "arrangement for continuous carriage," as defined in footnote 11, supra) does not exist as to shipments stopped at Great Falls. If a through interstate route did exist the total charge for service over it, being a charge for a single service, would have to be comprised entirely of interstate (rather than intrastate) local rates as factors, not only under the decision quoted, but under Section 6, Subdivision 1, of the Interstate Commerce Act, which requires carriers to file with the Commission "the separately established rates * * * applied to the through transportation" and Section 6(7) which requires such interstate rates to be observed in connection with interstate movements.[24]

In these circumstances the Commission's declaration accepted by the District Court and adopted by appellees in support of their motion to affirm that "the Butte routes are offered to the shippers as available routes but high combination rates on traffic transited at Great Falls keep them closed commercially for such traffic" is clearly erroneous and out of harmony with other portions of its report.[25] It is apparent that the Commission's declaration relied on by appellees, would not have been made "but for a view of the law" in which appellant cannot acquiesce and upon which this Court is asked to pass.

[24]49 U.S.C. 6(1) and 6(7). But the use of interstate "local rates" as factors in any through combination rate was here properly conceded by the parties and determined by the Commission to be improper. See footnotes 7, 17 and 18, *supra*.

[25]See text preceding footnotes 17 and 18, supra.

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The *Virginian case,* 272 U.S. 658, 666-67, relied on by appellees, simply sustains the Commission's jurisdiction to pass upon the lawfulness of a combination through rate made up of separately established local interstate rates applied to through transportation under Section 15(1) without regard to Sections 15(3) and 15(4). It adopts the Commission's definition of a through route in *Through Routes and Through Rates, supra.* Clearly it cannot sustain the contention that a through route exists for traffic milled or stored at Great Falls. The "combination rate" involved in the *Virginian case* applied to movements of coal which were continuous in physical fact, the sum or combination of the local interstate rates being available "as a single rate for a single service". The shipments of coal were not stopped in transit, did not lose their identity while out of the carrier's custody, no new bills of lading were issued at intermediate points, and there was certainly no lack of intent at initiation of the movement to ship any particular lot of coal to an interstate destination. In other words, none of the facts which are controlling here was present there.

III.

The Transit Ordered is Not a Regulation "Incidental" to the Operation of Existing Routes Open at Joint Rates on Continuous Shipments.

Physically, the railroad operations of appellant covered by the existing joint rates are completely different from those which would take place if transit were accorded. Now, under the joint rate, wheat moves in single, heavily-loaded cars from Triangle origins via Great Falls for interchange at Butte without interruption. In connection with that move-

ment appellant performs but one complete terminal service (in originating the car) and one partial terminal service (in interchanging the car with its connection at Butte). The transit operation would involve two additional, complete terminal services at Great Falls—(1) the delivery of an inbound car and (2) the origination of an outbound car—each involving expensive switching and loss of car days. Since wheat loads much more heavily than flour, the transit sought would also involve the furnishing of a substantially greater number of cars for flour movement, 1.52 cars for each car of wheat (Com. Ex. 11, Com. Tr. p. 296). Appellant naturally objects to the assumption of this burdensome service and the furnishing of extra cars to go off its line in connection with the much smaller proportion of the total haul it would receive from the Triangle to Butte—a weighted average haul of 231 miles (Com. Ex. 3, p. 9) compared with hauls to western junctions ranging up to over 1200 miles (Com. Ex. 8, p 3)—which would deprive it of substantial revenues on traffic it originates, even though appellant willingly assumes that burden in connection with routes according it its maximum haul.[26]

Subdivision I of the Argument shows that contractually and legally the transportation via Butte of continuous shipments at joint rates is essentially different from the transportation of wheat milled or stored at Great Falls and shipped from there via Butte. The absence of transit has not interfered with the legal operation of the Butte routes on continuous shipments, which routes were in effect for a decade before the complaint in the instant case was filed with the Commission.[27]

[26]Transit was recognized as "an additional burden upon the carriers" in *Grain Case Modifications*, 229 I. C. C. 9. For a discussion of Commission cases involving the propriety of limiting transit to routes according the carrier granting transit its maximum haul, see footnote 10, supra.

[27]July 1, 1935 to March 27, 1946.

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"Incidental" means "happening as a chance or undesigned feature of something else; casual, hence, not of prime concern; subordinate. (Merriam's Webster's New International Dictionary, Second Edition, Unabridged (1941)). To say that transit is "incidental" to the operation of the existing through routes on uninterrupted movements is a perversion of language and contrary to the fact. As a matter of fact the Commission itself, though it has not hesitated to regulate transit when voluntarily granted, has in the past been extremely reluctant to issue a mandatory order compelling it. In *Grain Case Modifications,* 229 I. C. C. 9 (sustained in this Court in *Board of Trade of Kansas City v. United States, supra*), the Commission, in declining to make such an order, said at page 12:

> "In the past we have been loath to order transit under Section 1, and have done so only in exceptional instances, and in respect to limited adjustments."

Undoubtedly this reluctance to make such an order, particularly in cases where the issue of through routes was not before it, has been the result of expressions of this Court in cases like *B. & O. S. W. RR. Co., v. Settle,* 260 U. S. 166, where it was said in a footnote at pp. 173-4:

> *"There are many instances when the grant by tariffs of extensive transit or reconsignment privileges have rendered what otherwise would be independent local movements a part of the through interstate movements."* (Emphasis supplied.)

The provisions of the Interstate Commerce Act are in *pari materia* and should be construed in harmony with each other. As this Court said in *Texas and Pacific Ry. Co. vs. Abilene Cotton Oil Co.,* 204 U. S. 426, 446, one provision of

the Act may not be construed so as to defeat another and the Act cannot be held to destroy itself. In *Joseph A. Goddard Realty Co. vs. New York C. & St. L. R. Co.*, 229 I. C. C. 497, where the Commission was asked to condemn as an unreasonable practice in violation of Section 1 (6) petitioner's failure to name certain industries in its tariff as entitled to receive certain switching and where the effect of the order sought under that Section would be to short haul defendant and permit the use of its line only for switching, the Commission said, at page 503:

> "* * * In other words, we are asked to do under section 1 that which under section 15(4) we are directly prohibited from doing. *The provisions of one section of the act must be considered in the light of other provisions of the act which may have a bearing thereon.*" (Emphasis supplied.)

Of course any other construction of the Act—that is one which would permit the creation of through routes and the short hauling of a carrier on important traffic in violation of its statutory rights by the simple expedient of picking words like "incidental," or of using labels and ignoring facts—would render Sections 15(3) and 15(4) entirely nugatory.

Appellant does not claim that the Commission would not have had authority to make the order which it did in a case properly pleaded and litigated under Sections 1(4),[28] 15(3) and 15(4). It claims merely that prescription of a transit privilege, which has the effect of permitting shipments to be joined together in a new through route, requires that the

[28] 49 U. S. C., Sec. 1 (4), not pleaded or litigated here and reading as follows:

> "It shall be the duty of every common carrier subject to this part to * * * establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; * * *."

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case be made under those sections and that those sections be construed together.

It is claimed by appellees, however, that this Court's decisions in *New York v. United States* (the *Class Rate Case*), 331 U. S. 284, and *Central RR. Co. of New Jersey v. U. S.*, 257 U. S. 247, 257, sustain the Commission's authority under Section 15(1) to require transit as a regulation incident to an existing route under Sections 1 (5), 1 (6) and 3 without regard to the sections mentioned. *New York v. U. S.*, however, did not involve transit. In the *Central of New Jersey* case this court had under consideration a decision of the Commission holding that the failure to grant a particular transit privilege on forest products was unduly prejudicial under Section 3 of the Interstate Commerce Act. The Court held that the finding of undue prejudice under that section could not be sustained and then said, by way of *obiter dictum:*

> "The Commission clearly has power under Sec. 1 of the Act to Regulate Commerce as amended to determine whether in a particular case a transit privilege should be granted or should be withdrawn. For that section requires, among other things, that carriers establish, in connection with through routes and joint rates, reasonable rules and regulations."

Section 1 contains a subdivision which appellees' argument overlooks, but which the Court had clearly in mind—subsection (4). Subsection (4) of Section 1 requires carriers "to establish reasonable through routes and to make reasonable rules and regulations with respect to their operation" and it has customarily been administered only in conformity with the powers given the Commission over the creation of through routes under Sections 15(3) and 15(4) *Western Pacific Rr. Co. vs. N. W. Pac. Rr. Co.*, 191 I. C. C. 127, 131. There is

"into a through movement" from the Triangle to California. But without transit, certainly, such a conversion is not possible, the through route must remain closed, and the inbound movement must remain intrastate and beyond the Commission's jurisdiction.[29] The Commission's order for transit can only be sustained therefore on the ground that its action, which will not only as a practical matter permit a radical change in the flow of traffic but also transform the legal character of the movements and transfer jurisdiction thereover from state authorities, is merely "incidental" to the operation of a route established for a movement of an entirely different nature.

If this order is sustained on such a theory then the Commission may lawfully require transit on logs as "incidental" to the operation of a through route on rough lumber, transit on rough lumber as "incidental" to a through route on finished lumber, or on furniture, and so on *ad infinitum*, regardless of what happens at the processing point, and the effect of Sections 15(3) and 15(4) will be entirely swept away and the jurisdiction of state authorities will be arrogated by the Commission without compliance with the statutory provisions for assuming such jurisdiction.

The legal implications of such a determination are vastly important not only to railroads like appellant, which depend for their revenues primarily on traffic they originate and which have customarily limited transit on many commodities so as to protect the hauls and revenues which Sections 15(3) and 15(4) have been regarded as designed to protect,[30] but to a proper understanding of the respective spheres within which state and federal regulation are properly operative.

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[29] See footnote 17, *supra*.

[30] In a recent case similar to this one, *Penn. RR. Co. v. U. S.*, 323 U. S. 588, the Court said: "The Commission's authority to grant relief is *bottomed* on Sections 15(3) and 15(4)." (Emphasis supplied.)

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IV.

As Literally Worded, the Order is Void.

Appellees point to the literal wording of the Commission's order (as partially quoted in footnote 2 of their motion) as one merely directing appellant to cease collecting, for traffic stored or milled at Great Falls, "rates exceeding the present joint rates" and as requiring it to establish for traffic stored or milled at Great Falls "rates" measured by such joint rates. It is claimed that the order as so worded cannot be one affirmatively requiring new through routes, but that it is merely a rate order.

The order may have been drawn so that it would be so interpreted. Even so interpreted, however, the order is fatal.

That is because a part of the transportation to which the literal language applies is presently intrastate. Until the separated movements become an interstate unit under some arrangement for continuous carriage the charges on which even such a rate order may operate are unquestionably outside the Commission's jurisdiction.[31]

It is noted that the order incorporates the Commission's report by reference and that at the conclusion of that report it is stated that transit will be required. For the traffic here involved that means that new through routes are ordered established.

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[31] See footnote 17, *supra*. State authorities were not notified of this proceeding under 49 U. S. C., Section 13(3) and did not participate therein.

CONCLUSION

Appellees' motion rests upon the assumed validity of declarations by the Commission, accepted by the Court below, which could not have been made under the undisputed facts but for a view of the law which is challenged by this appeal. The motion to affirm does not meet that challenge. Appellant respectfully asks that the motion be denied so that this Court may, upon the record, pass upon two serious and important questions: (1) to what extent the routing sections of the Act afford protection to originating carriers in respect of traffic stored or processed at points on their lines and (2) to what extent the jurisdiction of state authorities over local commerce may be taken away by requiring a transit which will permit through carriage without a full compliance with the jurisdictional prerequisites to the Commission's assertion of such jurisdiction.

Dated this 5th day of March, 1949.

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Of Counsel:

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AFFIDAVIT OF SERVICE

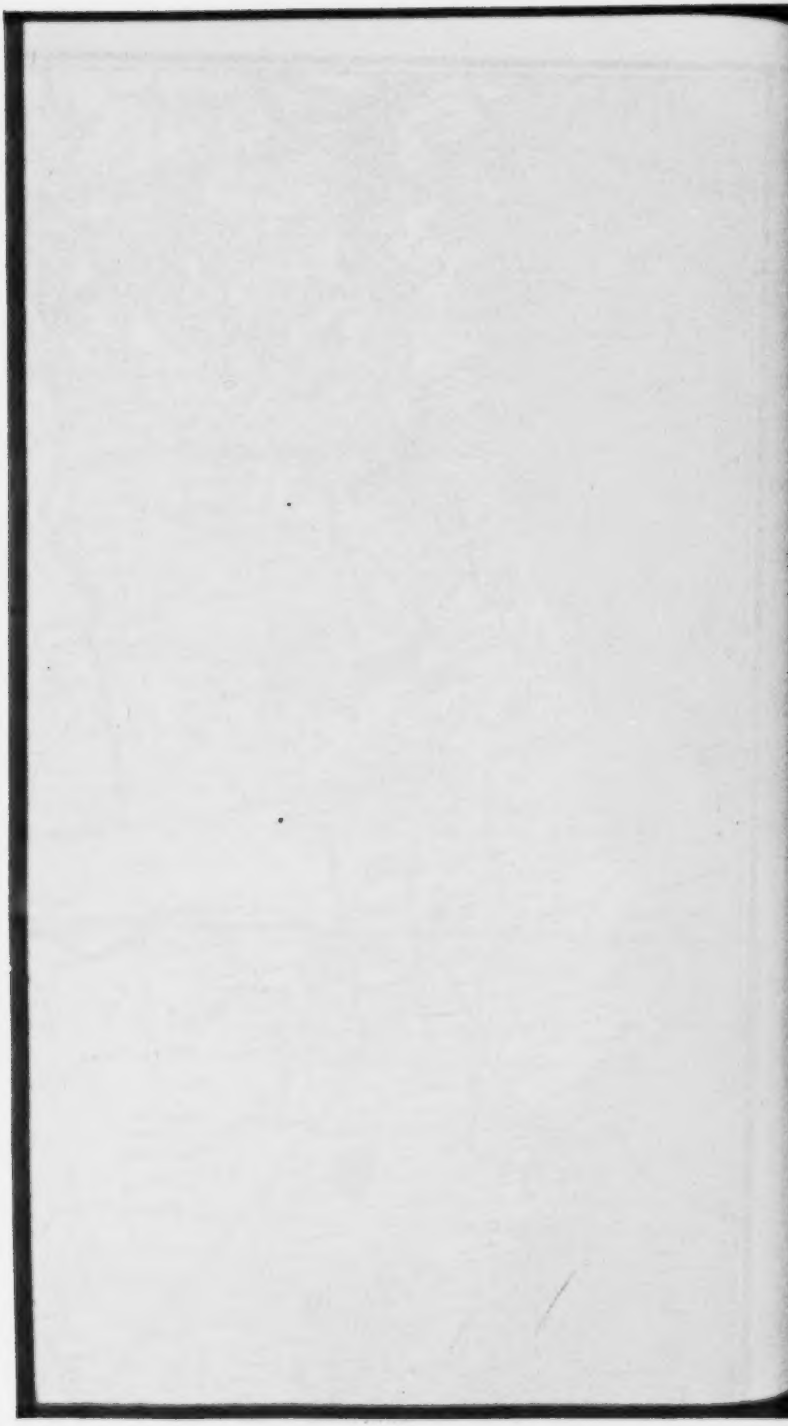
STATE OF MINNESOTA }
COUNTY OF RAMSEY } ss.

LOUIS E. TORINUS, JR., being first duly sworn upon oath, says that he is one of the attorneys for Great Northern Railway Company, the appellant herein, and that on Saturday, the 5th day of March, 1949, he forwarded to Daniel W. Knowlton, Chief Counsel, and J. Stanley Payne, Assistant Chief Counsel, Interstate Commerce Commission, Washington, D. C.; to Philip B. Perlman, Solicitor General of the United States, Herbert A. Bergson, Assistant Attorney General of the United States, and Edward Dumbauld and William J. Hickey, Special Assistants to the Attorney General of the United States, all of Washington, D. C.; and to Samuel Wettrick and Floyd F. Shields, Title and Trust Building, 111 West Washington Street, Chicago, Illinois, attorneys for appellees, General Mills, Inc. and Montana Flour Mills Company, the foregoing reply to motion to affirm by depositing copies thereof, properly enveloped, in the Post Office at St. Paul, Minnesota, with postage prepaid, one copy being addressed to each of the above-named counsel at their post office address as above set forth.

LOUIS E. TORINUS, JR.

Subscribed and sworn to before me
this 5th day of March, 1949.

ALPHA M. MULALLY
Notary Public, Ramsey County, Minn.
My Commission Expires July 11, 1949.
(NOTARIAL SEAL)



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil No. 1141

GREAT NORTHERN RAILWAY COMPANY, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GENERAL MILLS, INC., AND MONTANA FLOUR MILLS COMPANY, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

(Filed Feb. 16, 1949)

Appellees, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the judgment and decree of the District Court be affirmed.

This is a direct appeal from the final judgment and decree, entered on January 25, 1949 [1] by a specially constituted district court of three judges established pursuant to the Urged Deficiencies Act of October 22, 1913, dismissing appellant's complaint seeking to set aside an order of the Inter-

[1] The court rendered its opinion and made findings of fact and conclusions of law on December 27, 1948.

state Commerce Commission. Appeal was allowed on January 31, 1949, and appeal papers served on February 1, 1949.

The Commission's order,[2] dated December 18, 1947 (as modified on July 7, 1948), required appellant railroad to establish a "transit privilege"[3] for wheat and wheat products milled or stored in

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[2] The order in terms ordered appellant "to establish . . . maintain and apply to the transportation, in carloads, of wheat and wheat products from points on its line in the Triangle Territory in Central Montana to points in California and Nevada, via routes through Butte, Mont., when milled or stored in transit at Great Falls, Mont., rates which shall not exceed the present joint rates from and to the same points over the same routes on shipments of similar commodities not stopped in transit." The order further required the carrier "to cease and desist . . . from publishing, demanding, or collecting for the transportation" of such commodities on such routes from and to the points designated, in connection with the transit arrangements, "rates exceeding the present joint rates."

[3] "The privilege of transit enables grain to be shipped from point A to point B, there to be stored, marketed, or processed, and later reshipped to point C at a rate less than the combination of the separate rates from A to B and B to C. . . . The shipper pays the local rate on the inbound shipment to the transit point, B in our illustration. A receipted freight bill specifying the point of origin, the rate paid, and other pertinent data, is recorded with the transit bureau as evidence of intention of further transportation of the inbound grain or its equivalent. When the outbound shipment is tendered to the carrier, the freight bill is surrendered in order that the shipper may obtain an outbound rate lower than that which he would otherwise be compelled to pay." *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534, 537-538. The privilege which the Commission's order directs the appellant to accord at Great Falls, "like other transit privileges, rests upon the fiction that the incoming and the outgoing transportation services, which are in fact distinct, constitute a continuous shipment of the identical article from points of origin to final destination." *Central Railroad Co. of New Jersey* v. *United States*, 257 U.S. 247, 257.

transit at Great Falls, Montana, an intermediate point on existing through routes maintained by appellant and its connections from points in the so-called "Montana Triangle" area [4] to California and Nevada, via Great Falls, and Butte, Montana.

The shippers involved in this proceeding are engaged in the milling of wheat and wheat products at Great Falls, Montana. The appellant railroad and its connecting carriers maintain through routes from the Montana Triangle to California and Nevada via Great Falls and Butte, Montana, as well as more circuitous routes through Great Falls via Oregon and Washington gateways. Joint rates applicable to all of such routes were prescribed by the Commission in a prior comprehensive grain rate proceeding,[5] and the quantum of such rates is not in issue in this case. The rates were fixed at a level sufficiently high to cover exercise of the transit privilege without extra charge.

Appellant allows transit on the joint rates at all intermediate points on its lines on routes through

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[4] As described in the district court's opinion, "This area is embraced within a rough or general inverted triangle with the apex at Great Falls, Montana and the base being a line from Havre on the East and Shelby on the West. Within this general area there is grown a superior kind of hard spring wheat specially desirable for certain purposes because of its high protein content. There is a large market for flour from this wheat in the California market, and mills at Great Falls, Ogden, Utah and other places are in keen competition for that market."

[5] *Grain and Grain Products*, 205 I.C.C. 301, 449-450, sustained in *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534.

the western gateways, but has denied the privilege entirely on its lines through Great Falls via the Butte gateway.[6]

Accordingly shippers at Great Falls are precluded from use of the Butte routes because of high combination rates resulting from the denial of transit privilege on the through routes. Hence in order to obtain transit at Great Falls they must ship via appellant's western routes. Via those routes, however, an out-of-line charge is made in most instances, which must be paid when transit is taken at Great Falls. To remedy this unreasonable practice, prejudicial to complainants engaged in the milling business at Great Falls, the Commission made the order assailed in the case at bar.

This order was based upon the following finding made by the Commission:

> We find that defendant's failure to establish storing and processing in transit arrangements at Great Falls in connection with the present joint rates on wheat and wheat products from the Montana origins described in the complaint to destinations in Nevada and California over routes through Butte, is unreasonable and unduly prejudicial. The establishment of arrangements found reasonable will remove the undue prejudice to which complainant is subjected.

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[6] Other carriers participating with appellant in the through routes via Butte permit transit on the joint rates at all intermediate milling points south of Butte on their lines in Idaho, Utah, Nevada, and California.

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> An order requiring the establishment of transit arrangements found reasonable, will be entered. [269 I.C.C. at 469.]

Appellees submit that this appeal involves no substantial questions. Appellant's position is predicated entirely upon the assumption that the Commission's order is not one requiring the establishment of a reasonable transit practice as an incident of through routes and joint rates already in existence, but that the Commission's order requires the establishment of a *new* route via Great Falls. Only where a new route is being established could there be any occasion for making findings under Sections 15 (3) and 15 (4) of the Interstate Commerce Act.[7] Appellant's whole argument is premised upon the lack of such findings, and collapses entirely with the unsound premise upon which it is

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[7] 49 U.S.C. 15 (3) and 15 (4). Those sections provide that the Commission shall "whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes . . . and the terms and conditions under which such through routes shall be operated" and that "In establishing any such through route the Commission shall not . . . require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad . . . which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation." These "new route" provisions were construed in *Pennsylvania Railroad Co.* v. *United States*, 323 U.S. 588.

constructed. The untenableness of appellant's position is demonstrated plainly by the most cursory consideration of the terms of the Commission's order.[8] The order does not direct appellant to establish a new through route; it directs that the transit privilege be accorded in connection with "the present joint rates from and to the same points over the same routes" which appellant now maintains via Butte.

The Commission clearly explained the basis of its action in the following discussion contained in its report:

> The routes through Butte being open at joint rates which are available in connection with transit at points on lines south of Butte, the only question to be determined is the lawfulness of defendant's practice of denying transit on those rates to complainant at Great Falls. . . . We are clearly empowered upon the allegation and showing made here by complainant to require defendant to establish the requested transit at Great Falls on the present joint rates via Great Falls and Butte. A finding that transit should be established on an existing joint rate and through route is not a prescription of a joint rate and through route within the meaning of section 15 (3), but is merely an incidental requirement necessary to the reasonable and lawful operation of such existing joint rate and through route. There

[8] See note 2, *supra*.

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> is nothing in sections 15 (3) and 15 (4) of the act limiting or restricting our power to prescribe reasonable and nonprejudicial transit practices under sections 1 and 3 of the act in connection with the established joint rates over the Butte routes, which are part of the prescribed general adjustment of rates on grain. As far as the tariffs of defendants are concerned, the Butte routes are offered to the shippers as available routes but high combination rates on traffic transited at Great Falls keep them closed commercially for such traffic. In *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, the Supreme Court held that existing through rates, although they are combination rates, can be found unlawful under sections 1 and 3 of the act without a special finding of public interest essential to the validity of an order establishing through routes under section 15 (3). [269 I.C.C. at 466-7.]

Not only the Commission's findings, but appellant's own admissions as well, indisputably establish the fact that through routes are already in existence from the Montana Triangle to California and Nevada via Great Falls and Butte.

The existence of through routes with joint rates via Great Falls provides adequate foundation for exercise of the Commission's power to require that the transit privilege be accorded at Great Falls in connection with such routes and rates. That such power is conferred on the Commission under Sec-

tions 1 and 15 (1) of the Interstate Commerce Act [9] is demonstrated conclusively by a series of leading cases which are controlling here.

In *Central Railroad Co. of New Jersey* v. *United States,* 257 U. S. 247, 257, it was expressly held that the Commission had power to establish transit arrangements without resort to the provisions of the Act which appellant relies on here relating to establishment of new routes: [10]

> The Commission clearly has power under § 1 of the Act to Regulate Commerce as amended to determine whether in a particular

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[9] 49 U.S.C. 1 and 15 (1). These sections provide that "It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation" and that whenever the Commission finds that any "regulation, or practice whatsoever . . . is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe . . . what . . . regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist."

[10] Mere establishment of a transit privilege at a point on appellant's own lines does not create a through route. As defined in *St. Louis S. W. Ry. Co.* v. *United States,* 245 U.S. 136, 139, "A 'through route' is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. Through carriage implies a 'joint rate'. It may be merely an aggregation of separate rates fixed independently by the several carriers forming the 'through route'; as where the 'through rate' is the 'sum of locals' on the several connecting lines or is the sum of the lower rates otherwise separately established by them for through transportation."

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> case a transit privilege should be granted or should be withdrawn. For that Section requires among other things that carriers establish, in connection with through routes and joint rates, reasonable rules and regulations. The Commission might, therefore, acting under § 1, have directed the Central and the Pennsylvania to establish the creosoting-in-transit practice at Newark, if it deemed failure to do so unreasonable or unjust.

The power of the Commission under Sections 1 and 15 (1) of the Act to prescribe reasonable rules and practices in connection with existing through routes and joint rates was reiterated in the recent *Class Rate* case, *New York* v. *United States,* 331 U. S. 284, 342-343, where, after citing the above-quoted language of the *Central* case, the Court went on to say:

> there where the Commission acts pursuant to § 1 to require carriers to establish, in connection with through routes and joint rates, reasonable rules and regulations, . . . the Commission corrects the unlawful discriminatory practice in the case of each carrier by prescribing the just and reasonable rate or practice. The same is true where, as here, the Commission . . . proceeds under § 15 (1) . . .

The same contention which appellant makes here, that findings under the "new route" provisions of the Act are necessary, was rejected summarily and decisively in *Virginian Ry. Co.* v. *United*

States, 272 U. S. 658, 666-67. That case differed from the case at bar only in that there the Commission ordered that reasonable through rates be applied on existing through routes, while here the Commission ordered that reasonable practices with regard to the transit privilege be applied on existing through routes. But the power of the Commission is identical with respect to both of these subjects and is derived from the same statutory provisions. In the *Virginian* case the Court said:

> The Virginian contends that the order is void because the Commission directed the establishment of through routes and joint rates without finding that they are necessary in the public interest. Such a finding is essential to the validity of an order under § 15 (3). But the order here in question was not sought or made under § 15 (3) and does not direct the establishment of through routes and joint rates. Through routes to the West were already in existence. And there were through rates by combination . . . The fact that the combination rates were excessive constituted the only obstacle to the movement . . . The Commission found that the combination rate was both unreasonable and discriminatory. It prescribed through rates which it found were reasonable and non-discriminatory . . . The order was sought and made under § 1 and § 3. Section 15 (3) does not require that the Commission must make a special finding of public interest, before it can prescribe how an existing through rate found to be unreasonable

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and discriminatory shall be made conformable to law.

It thus becomes plain that, since the existence of through routes and rates via Great Falls is indisputable, and since the Commission's power to direct the establishment of the transit privilege as a reasonable practice incident to the operation of such routes is undeniable, the Commission's order in the case at bar is valid and should be sustained. The Commission here had no occasion to direct the establishment of a new route and the provisions of Sections 15 (3) and 15 (4) relating to that subject never came into play. Appellant's whole case, being bottomed upon the alleged necessity of findings under those sections of the Act, thus rests upon quicksand.

For the foregoing reasons, it is evident that this appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

(S.) PHILIP B. PERLMAN,
Solicitor General.

(S.) J. STANLEY PAYNE,
Assistant Chief Counsel,
Interstate Commerce Commission.

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No. 621. GREAT NORTHERN RAILWAY CO. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the District of Delaware. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Board of Trade* v. *United States*, 314 U. S. 534; *Virginian R. Co.* v. *United States*, 272 U. S. 658; *Central R. Co.* v. *United States*, 257 U. S. 247. *Edwin C. Matthias, Reuben J. Hagman, Louis E. Torinus, Jr., A. Rea Wil-*